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No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, ET AL., PETITIONERS

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR THE AMERICAN HEALTH CARE ASSOCIATION AND THE KENTUCKY ASSOCIATION OF HEALTH CARE FACILITIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement.

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INTEREST OF *AMICI CURIAE*

The American Health Care Association (AHCA) is the Nation's leading association of long-term care and post-acute care providers, representing the interests of more than 12,000 non-profit and proprietary facilities. AHCA's members are dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly, and disabled Americans who live in skilled nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities. AHCA advocates for quality care and services for frail, elderly, and disabled Americans. In order to ensure the availability of such services, AHCA also advocates for the continued vitality of the long-term and post-acute care provider community.[1]

One way in which AHCA promotes the interests of its members is by participating as an *amicus curiae* in cases before this Court with far-ranging consequences for its members. Such cases include those involving the proper application of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, in response to state judicial rulings inhibiting the use of arbitration to resolve disputes fairly and efficiently. *See, e.g.*, Br.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The petitioners' and respondents' written consents to the filing of this brief have been filed with the Clerk. Counsel of record for petitioners and respondents received notice of the *amici*'s intent to file this brief more than ten days before the due date.

Amicus Curiae for AHCA in Supp. of Pet'rs, *Clarksburg Nursing & Rehab. Ctr., Inc. v. Marchio*, No. 11-394 (U.S. Oct. 28, 2011), 2011 WL 5189096; *see also Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012) (per curiam) (granting *Clarksburg* petition in curve-lined cases where state court of last resort erroneously held that the FAA does not protect pre-dispute arbitration agreements covering claims of personal injury or wrongful death, summarily vacating state court's judgment, and remanding for further proceedings).

The Kentucky Association of Health Care Facilities (KAHCF) is a non-profit trade association representing approximately 200 licensed and certified nursing facilities throughout Kentucky. Founded in 1954, KAHCF is the primary advocacy organization for nursing facilities in Kentucky. KAHCF's mission is to promote quality long-term and post-acute care services and supports through advocacy, member services, education, and quality-achievement recognition. KAHCF advocates for its members in legislative, regulatory, and judicial settings to further the overall goals of its membership.

AHCA, KAHCF, and their respective members have a significant interest in the question presented by the petition for a writ of certiorari filed by Kindred Nursing Centers Limited Partnership, *et al.* (collectively, Kindred). The four-to-three decision of the Supreme Court of Kentucky at issue here held that powers of attorney authorizing attorneys-in-fact to enter into contracts do not include the authority to enter into one particular type of contract: arbitration agreements. Instead, the majority ruled that powers of attorney must contain an explicit, unambiguous

statement authorizing the attorney-in-fact to enter into arbitration agreements. That erroneous decision is emblematic of the struggle members of the long-term and post-acute care profession (collectively, LTC Profession) currently face in seeking judicial protection and enforcement of their federal arbitration rights. The majority decision below also is emblematic of the lengths to which certain state courts will go to impede the exercise of those rights by creating novel legal rules that single out arbitration for special treatment in spite of the FAA's admonition that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

SUMMARY OF ARGUMENT

The petition explains in detail (at 12–17) why the decision of the majority below conflicts with the FAA and this Court's decisions interpreting the statute. Rather than burden the Court by regurgitating those arguments, the *amici* wish to emphasize two additional reasons why timely intervention by this Court is necessary.

First, the question presented is of significant legal and practical importance. Individuals who require the assistance of the LTC Profession often are incapable of making decisions for themselves. As a result, powers of attorney granting the right to enter into contracts are a common and essential component of contracting within the LTC Profession. Arbitration agreements also are a common and essential component of contracting within the LTC Profession, which has long used arbitration as a means of ensuring timely, cost-effective, and fair dispute resolution. The

erroneous decision of the majority below throws into doubt the enforceability of countless such agreements. Moreover, the need for robust protection of federal arbitration rights is particularly acute in Kentucky, whose troubling litigation environment helps explain why a recent actuarial study of the LTC Profession found that Kentucky had the highest loss rate and claim severity of any State surveyed.

Second, deferring review will exacerbate the considerable burden already imposed by those who refuse to abide by this Court's FAA jurisprudence. The LTC Profession has borne the brunt of anti-arbitration efforts in courts throughout the United States. As a result, the LTC Profession has borne a disproportionate burden of having to defeat the numerous ways in which litigants and certain state courts seek to evade this Court's decisions interpreting the FAA. In many States, the protection and enforcement of federal arbitration rights still depends on whether the motion to compel arbitration will be decided in state or federal court. That unacceptable state of affairs currently exists on the very question presented in this case and will not be timely resolved unless this Court intercedes. The Court should do so and help bring a final end to the game of judicial whack-a-mole that has persisted in certain state courts unwilling to follow this Court's binding decisions interpreting the FAA.

ARGUMENT

I. THE QUESTION PRESENTED IS OF SIGNIFICANT LEGAL AND PRACTICAL IMPORTANCE

A. Powers of Attorney and Arbitration Agreements Are Essential Components of Contracting Within the LTC Profession

A significant percentage of individuals who require care by the LTC Profession are incapable of making informed decisions for themselves. Whether because of such things as accidental injury or disability resulting from the normal aging process, many individuals have planned for such an eventuality by executing general powers of attorney that give designated individuals authority to, among other things, enter into contracts on their behalf. The LTC Profession, in turn, depends on such powers of attorney to deliver timely care and to order its business affairs on a daily basis.

Arbitration agreements also are a common and essential component of contracting in the LTC Profession. Like many industry sectors, the LTC Profession has long used arbitration agreements as a means of facilitating timely and efficient dispute resolution. *See, e.g.*, AON Global Risk Consulting, *American Health Care Association Special Study on Arbitration in the Long Term Care Industry* 5 (June 2009) (describing history of profession's use of arbitration agreements and benefits of same), *available at* https://www.ahcancal.org (last visited Aug. 4, 2016).

Nowhere is the need for robust protection of federal arbitration rights more pronounced than in the jurisdiction giving rise to the petition in this case,

where the litigation environment is especially troubling for members of the LTC Profession. For example, a recent actuarial study of the LTC Profession performed by a leading provider of risk-management and insurance services found that Kentucky had the highest loss rate and claim severity of any State surveyed in 2015. AON Global Risk Consulting, *Long Term Care: General Liability and Professional Liability Actuarial Analysis* 30–31 (Nov. 2015), *available at* https://www.ahcancal.org (last visited Aug. 4, 2016); *see also id.* at 4 (defining "loss rate" as the "annual amount per occupied bed required to defend, settle or litigate claims in a given year"). That dubious distinction is expected to continue, as the projected loss rate in Kentucky for this year is almost *five times* the national average after growing exponentially over the past decade. *See id.* at 5, 30. Therefore, the jurisdiction giving rise to this case is an important battleground for federal arbitration rights.

B. The Decision Below Creates Great Legal Uncertainty

The majority below held that, before Kentucky's courts will enforce an arbitration agreement entered into by an attorney-in-fact pursuant to a power of attorney, the power of attorney must contain an explicit, unambiguous statement that it specifically authorizes the attorney-in-fact to enter into arbitration agreements. Pet. App. 41a. Language vesting an attorney-in-fact with authority to enter into contracts is insufficient. *Id.* at 42a.

That decision throws into doubt the enforceability of countless arbitration agreements. It is relatively uncommon for powers of attorney to satisfy the ex-

traordinary standard established by the majority below. Before that decision, there was no need to include such language because arbitration agreements are merely one form of contract that, under the FAA, cannot be singled out for special treatment. The decision of the majority below upends that reasonable expectation, and creates legal uncertainty that will undoubtedly spread to other jurisdictions hostile to the FAA.

II. Deferring Review Will Exacerbate the Considerable Burden Already Imposed By Those Who Refuse to Abide By This Court's FAA Jurisprudence

All manner of businesses and individuals rely on arbitration as a means of obtaining cost-effective and timely dispute resolution. In recent years, however, the profession at issue in this case has borne the brunt of anti-arbitration efforts in courts throughout the United States.

The official reporters of state and federal courts bear witness to the fact that nearly every argument imaginable has been made in an effort to impede the LTC Profession's invocation of its federal arbitration rights, often resulting in years of costly litigation at the trial and appellate levels. For example, those anti-arbitration efforts have included:

- Narrow constructions of the FAA and what types of arbitration agreements it protects. *See, e.g.*, *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 291 (W. Va. 2011) ("Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transac-

tion affecting interstate commerce."), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam).

- Narrow interpretations of what constitutes interstate commerce triggering the FAA's applicability. *Compare, e.g., Bruner v. Timberland Manor Ltd. P'ship*, 155 P.3d 16, 31 (Okla. 2006) ("The facts that the nursing home buys supplies from out-of-state vendors rather than in-state vendors and uses internet and long distance telephone lines do not demonstrate a substantial impact on interstate commerce . . . ."), *with Valley View Health Care, Inc. v. Chapman*, 992 F. Supp. 2d 1016, 1039 (E.D. Cal. 2014) (finding state officials, who sought to defend anti-arbitration statutes and regulations targeting the LTC Profession, "raise[d] no legitimate dispute whether the issues at stake here involve interstate commerce"), *and Rainbow Health Care Ctr., Inc. v. Crutcher*, No. 4:07-cv-00194-JHP, 2008 WL 268321, at *6–7 (N.D. Okla. Jan. 29, 2008) (rejecting state official's reliance on *Bruner*'s interstate-commerce analysis and finding FAA preempted state anti-arbitration statute targeting the LTC Profession);
- Requests to create unconscionability rules that do not apply to contracts generally. *See, e.g., Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 989 (Ala. 2004) (rejecting tort plaintiff's request for a "per se rule that would find unconscionable any arbitration agreement involving a nursing home");

- Contentions that parties to arbitration agreements must have equal arbitral obligations in order for the agreements to be enforceable. *See, e.g.*, *Carter v. SSC Odin Operating Co.*, 976 N.E.2d 344, 353 (Ill. 2012) (finding FAA preempted intermediate appellate court's reliance on mutuality-of-obligation theory in case involving member of the LTC Profession);
- Arguments that the McCarran-Ferguson Act shields state anti-arbitration laws from FAA preemption. *See, e.g.*, *Fredericksburg Care Co. v. Perez*, 461 S.W.3d 513, 518–28 (Tex. 2015) (reversing intermediate appellate court's ruling that the McCarran-Ferguson Act "reverse preempted" state statute imposing unique formatting and signature requirements on arbitration agreements covering claims against the LTC Profession); and
- Efforts to defeat FAA preemption based on the constitutional origin of the right to a jury trial. *See, e.g.*, *Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207, 1220 (Ill. 2010) (rejecting State's argument, in a case addressing anti-arbitration statutes targeting the LTC Profession, "that the FAA should not be read to preempt state provisions precluding the waiver of jury trials because the right to a jury trial is a fundamental constitutional right").

Indeed, the "constitutional right" line of reasoning was used by the Supreme Court of Kentucky majority in this case despite the fact that the foundation for this Court's preemption jurisprudence—the Supremacy Clause of the United States Constitution—applies regardless of whether the contrary state rule

is embodied in a state constitution, statute, regulation, or judicial decision. *Compare* Pet. App. 43a (majority decision below emphasizing that the "drafters of [Kentucky's] Constitution deemed the right to a jury trial to be *inviolate*, a right that cannot be taken away; and, indeed, a right that is *sacred*, thus denoting that right and that right alone as a divine God-given right."), *with* U.S. Const. art. VI, cl. 2 (Supremacy Clause) ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the *Constitution* or Laws of any State to the Contrary notwithstanding.") (emphasis added).

The persistent refusal of certain state courts to abide by this Court's interpretation of the FAA imposes a disproportionate burden on the LTC Profession. As this Court has explained, a "prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results." *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (internal quotation marks and citation omitted). Therefore, the primary benefits of arbitration—"lower costs, greater efficiency and speed," *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (internal quotation marks and citation omitted)—are irretrievably lost in the litigation gauntlet many providers must run just to have their arbitration agreements judicially enforced. The simple truth is that in certain States, providers know that if they attempt to enforce arbitration agreements covering tort disputes, there is a significant possibility that they will have to undergo lengthy and costly litigation over the arbitration

agreements' enforceability. Such litigation often involves considerable discovery, motions practice, and mini-trials over such things as the process leading to the execution of the arbitration agreements, as well as lengthy appellate litigation exemplified by the bullet list of rulings found above and Kindred's *six-year* quest to have the arbitration agreements at issue here enforced.

Most troublingly, the enforceability of providers' arbitration agreements often depends on the answer to a single question having nothing to do with the merits of whether the agreements satisfy general contract principles: namely, will the motion to compel arbitration be decided in state or federal court? Nowhere is that unfortunate reality better demonstrated than with the question presented in this case. As the petition explains (at 17–19), federal district judges in Kentucky have resoundingly rejected the reasoning used by the Supreme Court of Kentucky majority and have instead adopted the lucid dissent authored by Justice Abramson (now Hughes), which was joined by two of her colleagues and which concluded that the majority's decision conflicted with this Court's decisions interpreting the preemptive effect of the FAA. *See* Pet. App. 51a–100a.

Those intent on defeating federal arbitration rights typically have the first say of deciding where that legal battle will be fought. Tort suits against the LTC Profession are usually filed in state court. Because such suits normally involve alleged damages greater than $75,000, one common tactic tort plaintiffs use to defeat removal of their case to federal district court is to name as defendants not only the corporate entity that operates the facility, but also at

least one individual who resides in the State in which the case is filed. Such individuals typically include the facility's administrator or director of nursing. In many instances, the facility's operator then faces a stark choice: (1) remain in state court, where in certain States a motion to compel arbitration will almost certainly be denied and require years of potentially fruitless appellate litigation; or (2) file an independent action against the tort plaintiff in federal district court, the sole purpose of which is to have the arbitration agreement enforced. The latter option, in turn, often leads to a race by the parties to have one court rule on the arbitration agreement's enforceability before the other court can do so, which presents significant comity and abstention concerns. *Cf. Preferred Care of Del., Inc. v. Crocker*, --- F. Supp. 3d ---, No. 5:15-cv-00177-TBR, 2016 WL 1181786, at *11 (W.D. Ky. Mar. 25, 2016) ("Frankly, this Court is troubled and hesitant in disagreeing with the majority of the Kentucky Supreme Court [in this case].").

Not all providers have this luxury. For one thing, a provider's domestic citizenship may make it incapable of invoking the diversity-of-citizenship jurisdiction necessary for an independent federal action. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983) ("The [FAA] is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 . . . or otherwise."). Even if the provider's citizenship is different from that of the tort

plaintiff, the provider may simply lack the resources necessary to fund the simultaneous defense of a state-court suit and the prosecution of a federal-court suit.

Members of the LTC Profession should not have to make such expensive choices just to have their rights under the FAA respected. In effect, anti-arbitration forces have created a litigation environment in which many members of the LTC Profession reasonably question whether standing up for their federally protected arbitration rights is worth the cost. The net result is a *de facto* repeal of the FAA as it applies to the LTC Profession in certain jurisdictions, something which Congress has rejected.[2]

Deferring review in this case will only embolden litigants and state courts opposed to this Court's FAA jurisprudence and who are intent on undermining its application to the LTC Profession. Moreover, to those who might argue that the question presented should be allowed to percolate in order to permit

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[2] In the past decade, at least five bills have been introduced that would have amended the FAA to invalidate pre-dispute arbitration agreements between nursing facilities and their residents. Not a single one has received a vote by the full Senate or the House of Representatives. *See* Fairness in Nursing Home Arbitration Act, S. 2838, 110th Cong. § 3(4) (2008) (proposing to amend the FAA to expressly provide that pre-dispute arbitration agreements between nursing facilities and their residents "shall not be valid or specifically enforceable"); Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong. § 2(a) (same); Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. § 3(4) (2009) (same); Fairness in Nursing Home Arbitration Act of 2012, H.R. 6351, 112th Cong. § 2(a) (same).

the United States Court of Appeals for the Sixth Circuit to give its views on the legality of the rule established by the majority below, it should be noted that the Sixth Circuit is unlikely to do so in the foreseeable future. Most of the federal district court decisions rejecting the majority opinion have done so in the context of granting a motion to compel arbitration and have stayed litigation pending the completion of arbitration. *See, e.g.*, *Diversicare Highland, LLC v. Lee*, No. 3:15-cv-00836-GNS, 2016 WL 3512256, at *7 (W.D. Ky. June 22, 2016); *Riney v. GGNSC Louisville St. Matthews, LLC*, No. 3:16-cv-00122-JHM, 2016 WL 2853568, at *4 (W.D. Ky. May 13, 2016); *Owensboro Health Facilities, L.P. v. Henderson*, No. 4:16-cv-00002-JHM, 2016 WL 2853569, at *5 (W.D. Ky. May 13, 2016); *GGNSC Louisville Hillcreek, LLC v. Watkins*, No. 3:15-cv-00902-DJH, 2016 WL 815295, at *7 (W.D. Ky. Feb. 29, 2016). The law of the Sixth Circuit provides that such decisions are subject to appellate review as of right only *after* the underlying dispute is fully arbitrated and, in the unlikely event the tort plaintiff still wishes to challenge the district court's ruling on the motion to compel arbitration, *after* the completion of all proceedings in the district court with respect to the arbitration award. *See ATAC Corp. v. Arthur Treacher's Inc.*, 280 F.3d 1091, 1101 (6th Cir. 2002); *see also* 9 U.S.C. § 16(b) (providing that, in general, "an appeal may *not* be taken from an interlocutory order . . . granting a stay of any action under section 3 of this title . . . [or] directing arbitration to proceed under section 4 of this title") (emphasis added).

Accordingly, timely intervention by this Court is necessary. The rule established by the Supreme

Court of Kentucky majority conflicts with this Court's decisions interpreting the FAA and imposes a significant burden on the LTC Profession on a recurring legal issue of great practical importance. This Court should "promptly remove from the menu the [Supreme Court of Kentucky's] offering, a smuggled-in dish that is indigestible." *Spears v. United States*, 555 U.S. 261, 267 (2009) (per curiam).[3]

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[3] The *amici* note that a similar question is presented in *TAMKO Building Products, Inc. v. Hobbs*, No. 15-1318, which asks "[w]hether a state court can evade the preemptive force of the [FAA] by framing its refusal to enforce an arbitration agreement as a product of supposed defects in 'contract formation' that would not prevent the formation of any other contract." Cert. Pet. at i, *TAMKO Bldg. Prods., Inc. v. Hobbs*, No. 15-1318 (U.S. Apr. 25, 2016), 2016 WL 1697855. The Court has called for a response to the petition in *TAMKO*, which is due September 13, 2016.

CONCLUSION

For the foregoing reasons and those contained in Kindred's petition, the petition should be granted.

Respectfully submitted.

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